No. 96-110

In The

Supreme Court of the United States

October Term, 1996

STATE OF WASHINGTON, and CHRISTINE GREGOIRE, Attorney General of the State of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, COLORADO, FLORIDA, GEORGIA, ILLINOIS, IOWA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, ET AL.

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INTEREST OF THE *AMICI* STATES

Over a century ago, this Court, describing the dual sovereignty of the States and Federal Government, declared that:

> The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[1]

Respect for state sovereignty and the power of the people to directly govern their own affairs, unless excluded by the Constitution or valid Act of Congress, is the embodiment of our federalism.[2] It is this understanding of federalism which ensured ratification of the Constitution and which safeguards the essential role of the States in our federal system. There have been few cases in which this understanding of federalism has been disregarded as completely as in the case below.

In the history of our Nation, no court of final jurisdiction has ever declared the existence of a constitutional right or interest to commit suicide or assisted suicide.[3] However, in a radical departure from our Nation's history and tradition, and contrary to the laws of an overwhelming majority of States, the Ninth Circuit has announced its discovery of new rights to commit suicide and assisted suicide imbedded in the Due

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[1] *Texas v. White*, 7 Wall. 700, 725 (1869), *quoting Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X.

[3] The Second Circuit has rejected the claim that there is a liberty interest in assisted suicide under the Due Process Clause of the Fourteenth Amendment. *Quill v. Vacco*, 80 F.3d 716, 723-725 (2d Cir. 1996) (hereinafter "*Quill*"), *cert. granted*, ___ U.S. ___ (1996 WL 282544) (1996). The Second Circuit did, however, invalidate New York's prohibition of assisted suicide on equal protection grounds. *Quill*, 80 F.3d at 725-731.

Process Clause of the Fourteenth Amendment.[4] The Ninth Circuit's holding strikes at the very heart of this Court's federalism jurisprudence and, upon review, falls far short of overcoming that "great resistance" to expansion of the substantive content of the Due Process Clause. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986). It also "calls for some judgment about the limits of the [Judiciary's] role in carrying out its constitutional mandate." *Bowers*, 478 U.S. at 190.

At stake in this case are, first and foremost, the lives of the people, both those who wish to die and those who wish to live no matter what their circumstances. Also at stake is the sovereign power of the States to protect and preserve those lives without a federal requirement that the State "make judgments about the 'quality' of life that a particular individual may enjoy, . . . " *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990). The Court's decision in this case will directly affect the people of all the States of the Union. It will also determine whether "the States *as States* have [any] legitimate interests which the National Government is bound to respect even though its laws are supreme." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (italics original, citation omitted, insert added).

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[4] *Compassion in Dying v. State of Washington*, 79 F.3d 790, 793-794 (9th Cir. 1996) (*en banc*) (hereinafter "*Compassion in Dying II*"), *cert. granted*, ___ U.S. ___ (1996 WL 411596) (1996). A limited eleven-judge *en banc* panel vacated the previous decision of the three-judge panel, reported at *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995) (hereinafter "*Compassion in Dying I*"), which had voted 2-1 to reverse the district court decision, reported at 850 F.Supp. 1454 (W.D. Wash. 1994). Thereafter, an active judge *sua sponte* requested that the full court *en banc* rehear the case; however, that request failed to receive a majority of the votes of the non-recused active judges and was rejected. Dissenting opinions from the order rejecting the request for rehearing were filed by Circuit Judges O'Scannlain and Trott. *Compassion in Dying v. State of Washington*, 85 F.3d 1440 (9th Cir. 1996).

SUMMARY OF ARGUMENT

Americans today often speak in terms of their "right" to engage in particular conduct. However, "words [such] as 'right' are a constant solicitation to fallacy." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). In this case, respondents claim that patients have a "right to die." "The mere novelty of such a claim is reason enough to doubt that substantive due process sustains it; . . . " *Reno v. Flores*, 507 U.S. 292, 303 (1993). Indeed, the framers of the Fourteenth Amendment would be profoundly amazed if they were told that the liberty they sought to preserve for the newly freed slaves encompassed a liberty to kill oneself and, further, a liberty to receive the assistance of another to do so.[5] As discussed below, in order to sustain respondents' novel claim, the Ninth Circuit had to create a new standard for substantive due process adjudication and, in the process, committed a series of fundamental errors.

The threshold error was the Ninth Circuit's failure to carefully identify the specific conduct at issue, *i.e.*, suicide and assisted suicide. That failure, coupled with the broad approach utilized by the Ninth Circuit, opened the door to consideration of a host of activities which are wholly dissimilar from suicide and assisted suicide and which plainly involve different considerations.

The Ninth Circuit's discovery of new liberty interests in suicide and assisted suicide is unsupported by the plain language of the Due Process Clause, antithetical to its design, and unsupported by any previous decision of this Court. Indeed, this Court has never before recognized a "liberty" interest to extinguish the life of a "person" as that word is used in the Fourteenth Amendment. It is this critical difference between abortion and assisted suicide which exposes the fundamental error of seeking to create new liberty interests in

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[5] *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964) ("the historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. [insert added]").

suicide and assisted suicide by analogizing to the unique abortion rights jurisprudence.

There can be no doubt that opposition to suicide and assisted suicide is deeply rooted in our Nation's history and tradition. Furthermore, the Ninth Circuit failed to even consider whether suicide and assisted suicide are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937) (citation omitted). Instead, the Ninth Circuit fashioned a new standard for substantive due process adjudication premised on three sentences taken from *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the limited holding of the Court in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). That new standard, which is based on a concept of autonomous self-determinism, ignores both our Nation's history and tradition with respect to suicide and assisted suicide and, at the same time, "the demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Finally, the Ninth Circuit purported to limit its newly discovered interests in suicide and assisted suicide to just terminally ill, mentally competent adults. However, if, as the Ninth Circuit found, personal autonomy and the right to refuse unwanted medical treatment are the roots for these new liberty interests, such a limitation is plainly insupportable. In short, the decision below does not simply push the States down the so-called "slippery slope" – it hurls them over the precipice into a bottomless pit of constitutional litigation where they will spend decades litigating the parameters of these newly discovered liberty interests in suicide and assisted suicide.

With the ever-increasing power of medical science to prolong life, even in the face of what would otherwise be terminal illness, the States have had to strike a balance between the rights of the individual and "the demands of organized society." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). That balance is grounded in the States' recognition of their responsibility to protect both individual liberty and, at the same time, the lives of the people, both those who wish to die and those who wish to live no matter what their circumstances.

In striking that balance, the States have drawn a line between an individual's right to refuse unwanted medical treatment and intentionally killing oneself, with or without assistance. That balance, now a national consensus, is represented by statutes in a majority of States which recognize an individual's right to refuse unwanted medical treatment and, at the same time, reject any affirmative act to end life.[6] Whether that balance

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[6] Today, forty-seven state legislatures make the fundamental distinction between refusal of unwanted life-sustaining medical treatment and the act of suicide in their natural death/living will statutes: Ala. Code § 22-8A-10 (1990); Alaska Stat. § 18.12.080(f) (Michie 1994); Ariz. Rev. Stat. Ann. § 36-3210 (West Supp. 1995); Ark. Code Ann. § 20-17-210(g) (Michie 1991); Cal. Health & Safety Code § 7191.5(g) (West Supp. 1996); Colo. Rev. Stat. § 15-18-112(1) (West 1987); Fla. Stat. Ann. § 765.309(1) (West Supp. 1996); Ga. Code Ann. § 31-32-11(b) (1996); Haw. Rev. Stat. § 327D-13 (Supp. 1992); Ill. Comp. Ann. Stat. ch. 755, § 35/9(f) (Smith-Hurd 1992); Ind. Code Ann. § 16-36-4-19 (West Supp. 1996); Iowa Code Ann. § 144A.11.6 (West 1989); Kan. Stat. Ann. § 65-28,109 (1992); Ky. Rev. Stat. Ann. § 311.639 (Michie 1995); La. Rev. Stat. Ann. § 40:1299.58.10(A) (West 1992); Me. Rev. Stat. Ann. tit. 18-A, § 5-813(c) (West Supp. 1995); Md. Health-Gen. Code Ann. § 5-611(c) (1994); Minn. Stat. Ann. § 145B.14 (West Supp. 1996); Miss. Code Ann. § 41-41-117(2) (1993); Mo. Ann. Stat. § 459.055(5) (West 1992); Mont. Code Ann. § 50-9-205(7) (1995); Neb. Rev. Stat. Ann. § 20-412(7) (Michie 1995); Nev. Rev. Stat. Ann. § 449.670(2) (Michie 1991); N.H. Rev. Stat. Ann. § 137-H:13 (1996); N.C. Gen. Stat. § 90-320(b) (1993); N.D. Cent. Code § 23-06.4-01 (1991); Ohio Rev. Code Ann. § 2133.12(D) (Anderson Supp. 1995); Okla. Stat. Ann. tit. 63, § 3101.12(G) (West Supp. 1996); Pa. Cons. Stat. Ann. tit. 20, § 5402(b) (West Supp. 1996); R.I. Gen. Laws § 23-4.11-10(f) (Supp. 1995); S.C. Code Ann. § 44-77-130 (Law Co-op. Supp. 1996); S.D. Codified Laws Ann. § 34-12D-20 (Michie 1994); Tex. Health & Safety Code Ann. § 672.020 (West 1992); Utah Code Ann. § 75-2-1118 (1993); Va. Code Ann. § 54.1-2990 (Michie 1994); Wash. Rev. Code Ann. § 70.122.100 (West Supp. 1996); W.Va. Code § 16-30-10 (1995), *see also* § 16-30C-14 (1995)(DNR orders); Wis. Stat. Ann. § 154.11(6) (West 1989); Wyo. Stat. § 35-22-109 (Michie 1994). *See also* D.C. Code Ann. § 6-2430 (1989); or in their durable power of attorney for health care acts: Act of July 12, 1982, § 3, 63 Del. Laws 821 (1981); Idaho Code § 39-152 (Supp. 1996) (DNR orders); Ill. Comp. Stat. Ann. ch. 755, § 40/50 (Smith-Hurd 1992); Ind. Code Ann. §§ 16-36-1-12(c), 16-36-1-13

should be abandoned and the line redrawn to permit an individual to commit suicide without state interference, and then redrawn yet again to permit assisted suicide, is a matter appropriately left for the people to decide, through their duly elected representatives or by initiative ballot.[7] The principles of federalism embodied in our Constitution require no less.

ARGUMENT

I. THERE IS NO LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO COMMIT SUICIDE OR ASSISTED SUICIDE

The issue presented in this case is whether there is a liberty interest under the Due Process Clause of the Fourteenth Amendment to commit suicide and, if so, whether it includes an interest to receive the assistance of another to do so. The novelty of respondents' claim serves to highlight the importance of the cautionary note, expressed by the Court in *Bowers v. Hardwick*, which governs all substantive due process adjudication:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The

(West Supp. 1996), *see also* § 30-5-5-17(b) (West 1994); Iowa Code Ann. § 144B.12.2 (West Supp. 1996); Mass. Gen. Laws Ann. ch. 201D, § 12 (West Supp. 1996); Mich. Comp. Laws Ann. § 700.496(20) (West 1995); N.Y. Pub. Health Law § 2989(3) (McKinney 1993); N.D. Cent. Code § 23-06.5-01 (1991); R.I. Gen. Laws § 23-4.10-9(f) (Supp. 1995); Wyo. Stat. § 3-5-211 (Michie Supp. 1996); or both: *See also* Conn. Gen. Stat. Ann. § 19a-575 (West Supp. 1996) (form declarations); N.J. Stat. Ann. § 26:2H-54(d)-(e) (West 1996) (legislative findings); N.M. Stat. Ann. § 24-7A-13(C) (Michie Supp. 1995).

[7] *See People v. Kevorkian*, 447 Mich. 436, 481-482, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr.2d 59, 64 (1992). *See also Cruzan v. Harmon*, 760 S.W.2d 408, 426 (Mo. banc 1988) ("Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies."), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

> Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, 478 U.S. 186, 194-195 (1986).

The Court recently reaffirmed that "great resistance" in *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), declaring that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. [citation omitted]" Mindful of that "great resistance", it is of critical importance that lower courts carefully adhere to the principles established by this Court when construing the substantive content of the Due Process Clause. Unfortunately, as discussed below, the Ninth Circuit failed in this regard.

A. The Ninth Circuit's Constitutional Analysis Was Fundamentally Flawed At The Threshold By Its Failure To Carefully Identify The Specific Conduct At Issue

In the perilous waters of substantive due process adjudication, a carefully focused approach helps to eliminate the irrelevant, illuminate the pertinent, and insure that the discovery of new rights is "much more than the imposition of the Justices' own choice of values on the States and Federal Government, . . . " *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Indeed, the Court has made clear that " '[s]ubstantive

due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' " *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted). Thus, in *Bowers*, the Court carefully focused on the specific conduct at issue when it framed the question presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Bowers*, 478 U.S. at 190. The focus of the Court's inquiry was not whether one has a right to engage in sexual conduct of one's choice but, rather, whether the specific conduct at issue – homosexual sodomy – was entitled to constitutional protection. Likewise, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the Court carefully focused on whether Nancy Cruzan had "a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under [her] circumstances." *Cruzan*, 497 U.S. at 269 (insert added). This carefully focused approach allowed the Court to first identify the specific conduct at issue, *i.e.*, the withdrawal of unwanted life-sustaining medical treatment, and then the relevant historical traditions, *i.e.*, the doctrine of informed consent (which encompasses the notion of bodily integrity), protecting or denying protection to that specific conduct.

Rather than carefully focusing on suicide and assisted suicide, the Ninth Circuit broadly framed the question presented as "whether there is a liberty interest in determining the time and manner of one's death." *Compassion in Dying II*, 79 F.3d at 800. By doing so, it opened the door to consideration of a host of activities which are wholly dissimilar from suicide and assisted suicide and which plainly involve different considerations. Indeed, even the Ninth Circuit acknowledged that "[t]he liberty interest we examine encompasses a whole range of acts that are generally not considered to constitute 'suicide.' " *Compassion in Dying II*, 79 F.3d at 802.

In sharp contrast to the Ninth Circuit's broad approach, other courts which have considered this identical question

have utilized a carefully focused approach consistent with the precedents of this Court.[8] The Ninth Circuit's rationale for broadly framing the question presented was its belief that "it is the end and not the means that defines the liberty interest." *Compassion in Dying II*, 79 F.3d at 801. If true, the issues framed by this Court in *Bowers*, *Cruzan*, and *Reno v. Flores* were far too narrow. Rather, under the Ninth Circuit's new "end-result" standard for defining liberty interests, the issue in *Bowers* should have been whether there is a liberty interest to engage in sexual conduct of one's choice and, in *Cruzan*, whether there is a liberty interest to determine the time and manner of one's death. In fact, under the Ninth Circuit's new "end-result" standard, the issues in *Compassion in Dying II* and *Cruzan* should have been *identical*. In *Reno v. Flores*, respondents, a class of alien juveniles arrested by the Immigration and Naturalization Service on suspicion of being deportable and seeking a right to be routinely released into the custody of other "responsible adults," claimed a right to " 'freedom from physical restraint.' " *Reno v. Flores*, 507 U.S. 292, 299 (1993). Under the Ninth Circuit's new "end-result" standard, since "freedom from physical restraint" is the end sought to be achieved, that would be the proper description of the liberty interest at issue. However, that description was soundly rejected by this Court because it did not accurately identify the specific right or interest at issue. *Reno*, 507 U.S. at 302. Likewise, the question in the instant case is not "whether there is a liberty interest in determining the time and manner of one's death, . . . " *Compassion in Dying II*, 79 F.3d at 800. Rather, it is whether there is a liberty interest to commit suicide and, if so, whether it

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[8] *See, e.g., Quill*, 80 F.3d at 723 (Second Circuit carefully focusing on plaintiffs' argument "for a right to assisted suicide as a fundamental liberty under the substantive component of the Due Process Clause of the Fourteenth Amendment.") and *People v. Kevorkian*, 447 Mich. 436, 464, 527 N.W.2d 714, 724 (1994) (Michigan Supreme Court carefully focusing its inquiry on "whether the clause encompasses a fundamental right to commit suicide and, if so, whether it includes a right to assistance."), *cert. denied*, 115 S.Ct. 1795 (1995).

includes an interest to receive the assistance of another to do so.[9]

B. The Ninth Circuit's Discovery Of New Liberty Interests In Suicide And Assisted Suicide Is Not Supported By The Plain Language Or *Design* Of The Due Process Clause

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law; . . . " U.S. Const. amend. XIV, § 1. Nowhere in the plain language of the Clause is an interest in committing suicide or assisted suicide expressly granted. Nor does the *design* of the Clause support any such contention.[10] The design of the Clause establishes life as the first interest to be accorded substantive and procedural protection, liberty the second, and property the third. The reason for this design is manifest: without life, liberty cannot exist and property cannot be acquired. Any finding of a "liberty" interest to extinguish the life of a "person," as that word is used in the Fourteenth Amendment, inverts the order and is directly contradicted by, and plainly inconsistent with, the design of the Clause itself.[11]

This Court has never before recognized a "liberty" interest to extinguish the life of a "person" as it understands that

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[9] *Cf. People v. Kevorkian*, 447 Mich. 436, 476 n.47, 527 N.W.2d 714, 730 n.47 (1994) ("The question presented in this case thus is not whether a person has a constitutional right of self-determinism, or a right to define personal existence, or a right to make intimate and personal choices, or a right not to suffer. Rather, the question that we must decide is whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance."), *cert. denied*, 115 S.Ct. 1795 (1995).

[10] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language *or design* of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (emphasis added).

[11] *Cf.* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, 799, 807 (1994).

word to be used in the Fourteenth Amendment.[12] "[A] fundamental premise of our constitutional law governing reproductive autonomy" is the Court's holding in *Roe* that "an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.' " *Planned Parenthood v. Casey*, 505 U.S. 833, 913-914 (1992) (Stevens, J., concurring in part and dissenting in part), *citing Roe v. Wade*, 410 U.S. 113, 159 (1973). Indeed, in discussing its earlier decision in *United States v. Vuitch*, 402 U.S. 62 (1971), the Court made clear in *Roe* that it "would *not* have indulged in statutory interpretation favorable to abortion in specified circumstances *if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.*" *Roe*, 410 U.S. at 159 (emphasis added).

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[12] *See* Charles Warren, *The New "Liberty" Under The Fourteenth Amendment*, 39 Harv. L. Rev. 431, 439-445 (1926) (discussing decisions between 1789 and 1926 in which the term "liberty" has been construed by the Court). *See also Meyer v. Nebraska*, 262 U.S. 390 (1923) ("right to choose and pursue a given legitimate vocation"); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upbringing and education of children); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by unmarried couples); and *Roe v. Wade*, 410 U.S. 113 (1973) (decision of a woman to seek an abortion before fetus attains viability). In *Cruzan*, the Court did not explicitly recognize a liberty interest to terminate the life of a person entitled to Fourteenth Amendment protection; rather, it *assumed* a liberty interest, based on the doctrine of informed consent and notion of bodily integrity, to refuse unwanted life-sustaining medical treatment, regardless of the consequences of that refusal. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990). Moreover, since the patient's death is caused by his/her underlying terminal illness when unwanted life-sustaining medical treatment is refused or withdrawn, and not by any affirmative act intended to extinguish life, the assumed liberty interest recognized in *Cruzan* can in no way be considered the equivalent of a liberty interest to terminate the life of a person entitled to Fourteenth Amendment protection.

That is precisely the "necessary consequence" which this Court is confronted with in the instant case: "the termination of life entitled to Fourteenth Amendment protection." *Id.* Unsupported by the plain language of the Clause, antithetical to its design, and unsupported by any previous decision of this Court, there must necessarily be a strong presumption against the contention that a liberty interest to extinguish the life of a person entitled to Fourteenth Amendment protection can nevertheless be implied in the substantive content of the Clause itself.[13]

C. Opposition to Suicide and Assisted Suicide Is Deeply Rooted In This Nation's History And Tradition

This Court has established the principles to be used by the Judiciary when identifying "rights that have little or no textual support in the constitutional language." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (further citation omitted).

> In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion by Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

Bowers, 478 U.S. at 191-192 (citations omitted).

In approaching an historical analysis to determine whether a particular practice has been accepted by our people,

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[13] The States stand as the primary guardians of individual interests in life and liberty. Herein, the States are seeking to protect both individual interests, and their own institutional interests, in life. It is well-settled that individual interests are not afforded any less protection simply because the government, rather than the individual, is defending them. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 n.10 (1990).

it is important to remember that it is *this* Nation's history and tradition which is dispositive. *Cf. Bowers*, 478 U.S. at 191-194. An analysis, such as that utilized by the Ninth Circuit in *Compassion in Dying II*, which centers primarily on "ancient attitudes" having little, if any, relevance to America's historical and traditional treatment of suicide and assisted suicide cannot establish that such practices have been accepted by this Nation.[14]

Opposition to suicide is deeply rooted in *this* Nation's history and tradition. "At common law suicide was a felony, punished by forfeiture of property to the king and ignominious burial. Essentially, suicide was considered a form of murder." *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citations omitted). While no State has a statute imposing criminal penalties for a successful suicide,

> abolition of such "punishments" as ignominious burial for suicide and then the decriminalization of both suicide and attempted suicide did not come about because suicide was deemed a "human right" or even because it was no longer considered reprehensible. These changes occurred, rather, because punishment was seen as unfair to innocent relatives of the suicide and because those who committed or

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[14] "[T]he primary and most reliable indication of [a national] consensus . . . [is] the pattern of enacted laws." *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989). All but disregarding the statutes of the overwhelming majority of States which seek to prevent suicide and prohibit assisted suicide, and relying instead on public opinion polls and surveys, the Ninth Circuit found "growing popular support for permitting doctors to provide assistance to terminally ill patients who wish to hasten their deaths. [footnote omitted]" *Compassion in Dying II*, 79 F.3d at 810. Such polls and surveys simply have no place in substantive due process adjudication. Rather, "[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (Scalia, J.).

attempted to commit the act were thought to be prompted by mental illness.[15]

In the United States, suicide continues " 'to be considered an expression of mental illness.' "[16] Indeed, the New York State Task Force on Life and the Law found that "[s]tudies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death."[17] "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnotes omitted), *cert. denied*, 115 S.Ct. 1795 (1995). Simply stated, as Justice Scalia pointed out in his concurring opinion in *Cruzan*, " 'there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' "[18]

Logically, if there is no liberty interest to commit suicide, there can be no liberty interest in receiving the assistance of another to do so. *People v. Kevorkian*, 447 Mich. 436, 468 n.35, 527 N.W.2d 714, 726 n.35 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). However, an independent analysis of

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[15] Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 Hastings Center Report, No. 3, 32 (1993) (footnote omitted). See also *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 294-295 (1990) (Scalia, J., concurring).

[16] *In re Joseph G.*, 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 165 (1983) (citation omitted). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1624, 4 Cal.Rptr.2d 59, 64 (1992).

[17] New York State Task Force Report, *When Death is Sought – Assisted Suicide and Euthanasia in the Medical Context* (hereinafter "*When Death is Sought*") (May 1994) at 11.

[18] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 295 (1990) (Scalia, J., concurring) (citation omitted). *See also* Thomas J. Marzen, *et al.*, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 100 (1985) (reaching identical conclusion); and *When Death is Sought*, at 54-63 and 67-75.

the issue provides even more evidence that no such derivative interest exists. At common law, a person who assisted another to commit suicide was guilty of murder. *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983). "At the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a common-law offense." *People v. Kevorkian*, 447 Mich. 436, 478, 527 N.W.2d 714, 731 (1994) (citation omitted), *cert. denied*, 115 S.Ct. 1795 (1995).

Today, while a few states continue to classify assisted suicide as murder or manslaughter, "the predominant statutory scheme . . . is to create a sui generis crime of aiding and abetting suicide." *In re Joseph G.*, 34 Cal.3d 429, 434, 194 Cal.Rptr. 163, 165 (1983). The overwhelming majority of States, Puerto Rico and the Virgin Islands, impose criminal penalties on one who assists another to commit suicide.[19]

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[19] The following States, plus Puerto Rico and the Virgin Islands, expressly prohibit assisted suicide by statute: Alaska Stat., § 11.41.120(a)(2) (Michie 1989); Ariz. Rev. Stat. Ann., § 13-1103(A)(3) (West Supp. 1995); Ark. Stat. Ann., § 5-10-104(a)(2) (Michie 1993); Cal. Pen. Code, § 401 (West 1988); Colo. Rev. Stat., § 18-3-104(1)(b) (Supp. 1995); Conn. Gen. Stat. Ann., § 53a-56(a)(2) (West 1994); Del. Code Ann., tit. 11, § 645 (1995); Fla. Stat. Ann., § 782.08 (West 1992); Ga. Code Ann. § 16-5-5(b) (1996); Ill. Comp. Stat. Ann., ch. 720, 5/12-31(a)(2) (Smith-Hurd Supp. 1996); Ind. Stat. Ann., § 35-42-1-2.5(b) (West Supp. 1996); Iowa Code, §§ 707A.1, 707A.2 and 707A.3, as amended by Acts of the 76th General Assembly, 1996 Session; Kan. Stat. Ann., § 21-3406 (1995); Ky. Rev. Stat. Ann., § 216.302 (Michie 1995); La. Rev. Stat. Ann., § 14:32.12 (West Supp. 1996); Me. Rev. Stat. Ann., tit. 17-A, § 204 (West 1983); Minn. Stat. Ann., § 609.215 (West 1987 and Supp. 1996); Miss. Code Ann., § 97-3-49 (1994); Mo. Ann. Stat., § 565.023(1)(2) (West Supp. 1996); Mont. Code Ann., § 45-5-105 (1995); Neb. Rev. Stat. Ann., § 28-307 (Michie 1995); N.H. Rev. Stat. Ann., § 630:4 (1996); N.J. Stat. Ann., § 2C:11-6 (West 1995); N.M. Stat. Ann., § 30-2-4 (Michie 1994); N.Y. Penal Law, §§ 120.30, 125.15(3) (McKinney 1987); N.D. Cent. Code, § 12.1-16-04 (Supp. 1995); Okla. Stat. Ann., tit. 21, §§ 813, 814, 815 (West 1983); Pa. Cons. Stat. Ann., tit. 18, § 2505(b) (West 1983); P.R. Laws Ann., tit. 33, § 4009; R.I. Pub. Act 96-133, *to be codified as* R.I. Gen. Stat., tit.

Against this background, the claim that assisted suicide is so "deeply rooted in this Nation's history and tradition" that it is entitled to constitutional protection is entirely devoid of merit.[20]

D. Suicide And Assisted Suicide Are Not Implicit In The Concept Of Ordered Liberty Such That Neither Liberty Nor Justice Would Exist If They Were Sacrificed

"Ordered liberty" is not absolute liberty.[21] Rather, it is the liberty of an individual to pursue her lawful goals, without

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11, ch. 60; S.D. Codified Laws Ann., § 22-16-37 (Michie 1988); Tenn. Code Ann., § 39-13-216 (Supp. 1995); Tex. Penal Code Ann., § 22.08 (West 1994); V.I. Code Ann., tit. 14, § 2141; Wash. Rev. Code Ann., § 9A.36.060 (West 1988); and Wis. Stat. Ann., § 940.12 (West 1996). *See also* Or. Rev. Stat. § 163.125(1)(b) (1993) (prohibiting assisted suicide generally), *but see* Or. Rev. Stat. § 127.800 *et seq.* (1996) (permitting physician-assisted suicide in certain circumstances). The following states impose criminal penalties by case law for assisting a suicide: *Commonwealth v. Mink*, 123 Mass. 422, 428-429 (1877); *People v. Kevorkian*, 447 Mich. 436, 493-497, 527 N.W.2d 714, 738-739 (1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); *State v. Jones*, 86 S.C. 17, 22, 47, 67 S.E. 160, 162, 165 (1910); and *State v. Willis*, 255 N.C. 473, 477, 121 S.E.2d 854, 856-857 (1961).

[20] *Cf. Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986). *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, . . . ").

[21] Almost a century ago, the Court reaffirmed this understanding of liberty when it stated that:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned."

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (citations omitted).

unreasonable state interference, in light of "the demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). "Ordered liberty" is not founded, as the Ninth Circuit's opinion was, on a concept of autonomous self-determinism. Rather, it is founded on a firm understanding of the "traditions and conscience of our people . . . " *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citations omitted). As the second Justice Harlan observed in *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment):

> Judicial restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. (citation omitted)[22]

With these principles in mind, this Court must now determine whether suicide and assisted suicide are "implicit in the

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[22] *See also Ex parte Grossman*, 267 U.S. 87, 108-109 (1925) ("The language of the constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.").

concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (citation omitted). In *Compassion in Dying II*, the Ninth Circuit failed to even apply this standard and, instead, simply declared:

> That [this] language . . . has never been applied literally. It would be difficult, if not impossible, for any fundamental right or liberty interest to meet such a standard. One could hardly argue for example that neither liberty nor justice would survive if contraceptives were banned, as they were for most of our history. Nor indubitably, would even the most vigorous proponent of abortion rights argue that neither liberty nor justice existed in this nation prior to *Roe*.

Compassion in Dying II, 79 F.3d at 813 n.64 (insert added).

Application of the *Palko* standard is neither difficult nor impossible and, contrary to the Ninth Circuit's view, this Court has concluded that certain fundamental rights and interests plainly meet that standard. Examples of this can be found in *Palko* itself where, discussing "the privileges and immunities that have been . . . brought within the Fourteenth Amendment by a process of absorption," the Court cited "freedom of thought, and speech," and noted that this freedom "is the matrix, the indispensable condition, of nearly every other form of freedom."[23] *Palko*, 302 U.S. 326-327. "[C]ondemnation only after trial", and a defendant's right to counsel in a state-court capital case were other examples of fundamental liberty interests cited by the Court in *Palko*. *Id.* at 327 (citations omitted). As in *Palko*, the question herein (which the Ninth Circuit never reached) is simply this:

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[23] Twelve years earlier, in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the Court stated that: "For present purposes, we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

> Is [Washington's absolute prohibition of assisted suicide] so . . . shocking that our policy will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?

Id. at 328 (citation omitted, insert added).

Indeed, can it truly be said that "[j]ustice . . . would . . . perish" (*Id.*, at 326) if the States continue to prevent their citizens from committing suicide and, at the same time, continue to prohibit one person from assisting another to commit suicide? Plainly, the answer to all of these questions is "no." Of "the basic values that underlie our society," (*Griswold*, 381 U.S. at 501 (Harlan, J., concurring in judgment)), certainly the most important is our fundamental respect for human life. State policies which further that most basic societal value can hardly be said to imperil either justice or liberty.

Rather than applying the *Palko* standard consistent with the precedents of this Court, the Ninth Circuit relied on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), to support its discovery of new liberty interests to commit suicide and assisted suicide. That reliance was entirely misplaced.

In *Casey*, the Court was not called upon to decide whether some newly asserted liberty interest to choose an abortion was entitled to constitutional protection. Rather, the primary question presented in *Casey* was whether the fundamental holding of *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled. *Casey*, 505 U.S. at 844-846. Thus, the Court had no reason to discuss, and did not discuss, the well-established principles for construing the substantive content of the Due Process Clause. The Ninth Circuit's extensive reliance on *Casey*, and its apparent belief that *Casey* has modified, *sub silentio*, long-standing principles for construing the substantive content of the Due Process Clause, was particularly surprising since, in the same opinion, the Ninth Circuit rejected similar arguments regarding the effect of the Court's decision in *Reno v. Flores* as to whether all liberty interests

other than fundamental rights would be subjected to rational-basis review or balancing.[24]

In declaring the existence of new liberty interests to commit suicide and assisted suicide, the Ninth Circuit found the following three sentences from *Casey* to be almost controlling on the issue before it:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[25]

Contrary to the Ninth Circuit's reasoning, these three sentences taken from *Casey* – broad generalities on the nature

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[24] In attempting to distinguish *Reno v. Flores*, the Ninth Circuit stated that:

> The Court did not, as the dissent implies, purport to establish a new classification system under which all liberty interests other than fundamental rights would be subject to rational basis review. Nor did *Flores* purport to overrule, or even hint at any desire to modify, the Court's ninety-year-old practice of using a balancing test in liberty interest cases that raise important issues of the type before us. In fact, *Flores* did not mention *Cruzan*, *Youngberg*, *Mills*, *Jacobson*, or any other balancing case.

Compassion in Dying II, 79 F.3d at 804 (footnote omitted). These same arguments are equally applicable to the Ninth Circuit's apparent belief that *Casey* has overruled or modified, *sub silentio*, long-standing principles for construing the substantive content of the Due Process Clause.

[25] *Compassion in Dying II*, 79 F.3d at 813, *quoting Casey*, 505 U.S. at 851. *See also Id.* (Ninth Circuit agreeing with district court that *Casey* is "highly instructive and almost prescriptive for determining what liberty interest may inhere in a terminally ill person's choice to commit suicide. [citation and internal quotes omitted]").

of the liberty protected by the Fourteenth Amendment – did not establish a new standard for construing the substantive content of the Due Process Clause. If the Court in *Casey* had intended to eliminate the long-standing principles which govern substantive due process adjudication, plainly it would have said so. Furthermore, when taken out of context, "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" has almost limitless application. Likewise, many activities which plainly are not entitled to constitutional protection can nevertheless be characterized as "intimate", "personal" or involving "choices central to personal dignity and autonomy." When taken out of context and fashioned into a new standard for substantive due process adjudication, these three sentences are entirely inconsistent with accepted understandings of "ordered liberty." Such a new standard would virtually eliminate the "guideposts for responsible decisionmaking in this unchartered area [which] are [already] scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (inserts added).

The Ninth Circuit's reliance on *Casey* was also predicated on the mistaken notion that simply because a decision may involve "choices central to personal dignity and autonomy," one is free to do whatever one wants with one's body. This is not the "ordered liberty" discussed by the Court in *Palko* and the cases which followed it. Rather, this is precisely the sort of "unlimited right to do with one's body as one pleases" which this Court has consistently and soundly rejected. *See Roe v. Wade*, 410 U.S. 113, 154 (1973), and cases cited therein; *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973), *citing*, *inter alia*, constitutionally unchallenged laws against suicide.

The Ninth Circuit's reliance on *Casey* also ignores the fundamental differences between abortion, suicide and assisted suicide. This Court has held that abortion does not extinguish the life of a "person" in the context of the

Fourteenth Amendment.[26] Certainly, it cannot be denied that suicide does. Under *Roe*, abortion concerns the choice of a woman, the decision-maker, to live her life without the dangers and unwanted conditions associated with pregnancy.[27] Suicide, on the other hand, is about death, *i.e.*, the death of the decision-maker. Finally, the States' treatment of abortion and assisted suicide has been markedly different. In *Roe*, the Court observed that "[i]n the past several years, . . . a trend toward liberalization of abortion statutes ha[d] resulted in adoption, by about one-third of the States, of less stringent laws, . . . " *Roe v. Wade*, 410 U.S. 113, 139-140 (1973). No such trend exists with respect to assisted suicide. *See* ns.6 and 19, *supra*.

In summary, as Justice O'Connor observed in *Casey*, "[a]bortion is a unique act" and "the liberty interest of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. It is a fundamental error to seek to discover new constitutional rights to commit suicide and assisted suicide by analogizing to the unique abortion rights jurisprudence. There is simply no indication in *Casey*, or the precedent from which it evolved, of an intention to expand the liberty interests previously identified by this Court in the manner utilized by the Ninth Circuit.

Nor does this Court's decision in *Cruzan* support the Ninth Circuit's discovery of new liberty interests to commit suicide and assisted suicide. In *Cruzan*, this Court stated

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[26] *Roe v. Wade*, 410 U.S. 113, 158-159 (1973). While, under *Roe*, an unborn fetus is not yet a "person" as that word is used in the Fourteenth Amendment, its proximity to that status after viability so strengthens the State's interest in preserving and protecting fetal life that nontherapeutic abortions can be absolutely prohibited at that stage of a woman's pregnancy. *See Roe*, 410 U.S. at 164-165 and *Casey*, 505 U.S. at 846, 860, 869, 870, and 879.

[27] *Roe v. Wade*, 410 U.S. 113, 153 (1973) (listing factors a woman and her physician would necessarily consider when considering an abortion).

that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan*, 497 U.S. at 278. Later in the opinion, the Court stated that "*for purposes of this case*, we *assume* that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*, 497 U.S. at 279 (emphasis added). Careful examination of this portion of the *Cruzan* opinion reveals two critical points. First, the Court *assumed*, but did not expressly hold, that there is a constitutionally protected interest to refuse life-sustaining medical treatment. Second, this assumption was expressly limited to the *Cruzan* case. Notwithstanding this clear language, the Ninth Circuit read *Cruzan* as "necessarily recogniz[ing] a liberty interest in hastening one's own death." *Compassion in Dying II*, 79 F.3d at 816 (footnote omitted, insert added). Such a reading of *Cruzan* assumes far too much.[28] It is error to attempt to construe *Cruzan's* limited assumption of an interest to refuse medical treatment as acceptance by this Court of a far broader interest to commit suicide and, broader still, assisted suicide. Indeed, the error of such an attempt is plainly evidenced by the majority's recognition in *Cruzan* that, even in the face of a right to refuse medical treatment, the States may properly assert important interests in the protection and preservation of human life, and in the prevention of both suicide and assisted suicide. *Cruzan*, 497 U.S. at 280-282. In summary, suicide and assisted suicide are so significantly different from the refusal of unwanted medical treatment, and its legal underpinnings, that an interest

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[28] The Ninth Circuit's broad reading of *Cruzan* is also inconsistent with this Court's clear admonition in *Cruzan* itself that "in deciding a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." *Cruzan*, 497 U.S. at 277-278 (citation and internal quotes omitted, insert and omission original).

in committing suicide or assisted suicide simply cannot be inferred from *Cruzan*.[29]

E. The New Liberty Interests In Suicide And Assisted Suicide Discovered By The Ninth Circuit Cannot Be Limited To Terminally-Ill, Mentally Competent Adults

If personal autonomy and the right to refuse unwanted medical treatment are the roots for these newly discovered liberty interests to commit suicide and assisted suicide, any purported limitation of these new interests to just terminally ill, mentally competent adults is plainly insupportable.

In this regard, Professor Yale Kamisar has observed:

> If personal autonomy and the termination of suffering are the key factors fueling the right to assisted suicide, why exclude those with non-terminal illnesses or disabilities who might have to endure greater "unbearable suffering" for much longer periods of time than those who are likely to die in the near future? Why does not a person who must continue to live what she considers an unendurable existence for ten or twenty more years have an equal – or even greater – claim on the liberty interest in assisted suicide than those with terminal conditions?

Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in Euthanasia Examined, 225, 234 (John Keown, ed. 1995) (Cambridge University Press) (footnote omitted).

While the Ninth Circuit, at least in the case below, purported to limit suicide and assisted suicide to just the terminally ill,

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[29] Unlike suicide, "[t]he right to refuse medical treatment meets the 'ordered liberty' and the 'historical underpinnings' tests because it is rooted in the common-law doctrine of informed consent, which embodies the notion of bodily integrity." *People v. Kevorkian*, 447 Mich. 436, 480 n.59, 527 N.W.2d 714, 732 n.59 (1994), *cert. denied*, 115 S.Ct. 1795 (1995).

> Why stop there? If a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly, and repeatedly requests assisted suicide, why should he be rebuffed because he does not "qualify" under somebody else's standards? Isn't *this* an arbitrary limitation of self-determinism and personal autonomy?

Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 Hastings Center Report, No. 3, 32, 37 (1993) (emphasis original).

Indeed, as the Michigan Supreme Court recently observed:

> [B]ecause all persons possess a basic right to personal autonomy, regardless of their physical or mental condition, there would be no principled basis for restricting a right to commit suicide to the terminally ill. The inevitability of death adds nothing to the constitutional analysis.

People v. Kevorkian, 447 Mich. 436, 470 n.41, 527 N.W.2d 714, 727-728 n.41 (1994), *cert. denied*, 115 S.Ct. 1795 (1995).

Nor do the right-to-refuse treatment cases provide any support for such a limitation. First, there is wide disagreement among the States as to the definition of "terminal illness."[30] Second, the right-to-refuse medical treatment has not been limited to just the terminally ill.[31] Finally, even if these newly discovered liberty interests in suicide and assisted suicide are initially limited to just the

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[30] *See* Alan Meisel, *The Right to Die*, Vol 2, § 11.9, 96-101 (2d ed. 1995). *See also* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, 799, 814-819 (1994); Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in Euthanasia Examined, 225, 234 (John Keown, ed. 1995) (Cambridge University Press).

[31] *See Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 277 (1990) ("As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.").

terminally ill, it is far from clear whether the Ninth Circuit intends that limitation to endure for long. In this regard, the Ninth Circuit stated that:

> Our conclusion is strongly influenced by, but not limited to, the plight of mentally competent, terminally ill adults. We are influenced as well by the plight of others, such as those whose existence is reduced to a vegetative state or a permanent and irreversible state of unconsciousness.

Compassion in Dying II, 79 F.3d at 816 (citation omitted).

If the decision below is affirmed, the next question to be decided by the courts will be whether those who are neither terminally ill nor mentally competent can likewise exercise these new liberty interests to commit suicide and assisted suicide. The question of whether the States may prohibit active voluntary euthanasia, as opposed to suicide and assisted suicide, will likewise be on the horizon.[32] Thus, the decision below does not simply push the States down the so-called "slippery slope" – it hurls them over the precipice into a bottomless pit of constitutional litigation where they will spend decades litigating the parameters of these newly discovered liberty interests in suicide and assisted suicide.

II. RELEVANT STATE INTERESTS CLEARLY OUTWEIGH ASSERTED INTERESTS IN SUICIDE AND ASSISTED SUICIDE

Only if this Court finds protected liberty interests in suicide and assisted suicide, does it then become necessary to

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[32] *Compassion in Dying II*, 79 F.3d at 831-832 ("We recognize that in some instances, the patient may be unable to self-administer the drugs and that administration by the physician, or a person acting under his direction or control, may be the only way the patient may be able to receive them. [footnote omitted] The question whether that type of physician conduct may be constitutionally prohibited must be answered directly in future cases, and not in this one. We would be less than candid, however, if we did not acknowledge that for present purposes we view the critical line in right-to-die cases as the one between the voluntary and involuntary termination of an individual's life.").

balance those interests against countervailing state interests.[33] In the event of such a finding, the wide range of circumstances within which these newly discovered interests could be exercised implicate several important state interests, including, but not limited to: (1) the protection and preservation of human life;[34] (2) the prevention of suicide;[35] (3) preventing the fraud, errors and abuse which would accompany acceptance of suicide and assisted suicide;[36] (4) maintaining the ethical integrity of the medical profession;[37] (5) protecting the poor and minorities from

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[33] *Cruzan*, 497 U.S. at 261. *Cf. Quill*, 80 F.3d 716, 723-725 (rejecting Fourteenth Amendment assisted suicide liberty interest claim and thus no balancing required); *People v. Kevorkian*, 447 Mich. 436, 463-481, 527 N.W.2d 714, 724-733 (1994) (reaching same conclusion and thus no balancing required), *cert. denied*, 115 S.Ct. 1795 (1995).

[34] *Cruzan*, 497 U.S. at 280.

[35] "Suicide is the eighth leading cause of death in the United States." *When Death is Sought*, at 9 (footnote omitted). "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." *Id.*, at 11. Furthermore, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.*, at 13 (footnote omitted).

[36] *Cruzan*, 497 U.S. at 281 ("[E]ven where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations. [citation omitted, internal quotes omitted]"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end.").

[37] *Cf. Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (important state interest in "maintaining and assuring the professional conduct of professional attorneys it licenses").

exploitation;[38] (6) protecting handicapped persons from societal indifference;[39] and (7) protecting innocent third parties.[40]

While the Ninth Circuit acknowledged, at least to some extent, some of these interests, its application of the balancing test was fundamentally flawed by the improper insertion of quality-of-life considerations which it used to discount the strength of various important state interests.[41] Such quality-of-life considerations are directly contrary to this Court's holding in *Cruzan* that "a State may properly decline to make

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See also Donaldson v. Lungren, 2 Cal.App.4th 1614, 1620, 4 Cal.Rptr.2d 59, 62 (1992) (recognizing state interest in maintaining the ethical integrity of the medical profession). In reaffirming its long-standing opposition to physician-assisted suicide, the American Medical Association has declared that physician-assisted suicide "threatens the very core of the medical profession's ethical integrity" and is "fundamentally inconsistent with the physician's professional role." American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2 (July 1994), Report 59, *Physician-Assisted Suicide*, 269 and 274, respectively.

[38] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[39] *Quill*, 80 F.3d at 730, *citing Compassion in Dying I*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[40] *Application of President & Directors of Georgetown College, Inc.*, 118 U.S.App.D.C. 80, 331 F.2d 1000, 1008 (1964), *cert. denied*, 377 U.S. 978 (1964). *See also Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 n.6, 209 Cal.Rptr. 220, 225 n.6 (1984).

[41] *Compassion in Dying II*, 79 F.3d at 817 (strength of the state's important interest in the preservation of human life "is dependent on relevant circumstances, including the medical condition and the wishes of the person whose life is at stake."); *Id.*, at 820 (state interest in preventing suicide, "like the state's interest in preserving life, is substantially diminished in the case of terminally ill, competent adults who wish to die. [footnote omitted]"); *Id.*, at 825 (state's interest in preventing involvement of third persons at a minimum "when the assistance is provided by or under the supervision or direction of a doctor and the recipient is a terminally ill patient."); and *Id.*, at 827 (state's interest in protecting innocent third parties "is of almost negligible weight when the patient is terminally ill and his death is imminent and inevitable.").

judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan*, 497 U.S. at 282.

Moreover, the dangers inherent in using such quality-of-life considerations are well-recognized. "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 422 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). An analysis such as that utilized by the Ninth Circuit also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law. *See Blackburn v. State*, 23 Ohio St. 146, 163 (1872). When properly weighed, without the insertion of improper quality-of-life considerations, the States' interests, individually and collectively, clearly outweigh any individual interests in committing suicide and assisted suicide.

III. THE DECISION BELOW SHOULD BE REVERSED IN ORDER TO REAFFIRM THE ESSENTIAL ROLE OF THE STATES IN OUR FEDERAL SYSTEM OF GOVERNMENT AND THE POWER OF THE PEOPLE TO DIRECTLY GOVERN THEIR OWN AFFAIRS

As the States grapple with the difficult questions presented by the ever-increasing ability of medical technology to prolong life, the corresponding need to allow the States to serve as laboratories for change becomes paramount. Indeed, as this Court has recognized, "[t]he science of government . . . is the science of experiment, . . . " *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985) (citation and internal quotes omitted). A decision affirming the Ninth Circuit's opinion in *Compassion in Dying II* will effectively extinguish the power of the States to continue to serve as laboratories for change on an issue that arguably will affect more lives than any issue the States will face in the foreseeable future. *See*

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It will also "invite[] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy."[42] *Garcia*, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted).

> That a question is important does not mean that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary.

Compassion in Dying II, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, C.J., dissenting).

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit in No. 96-110 should be reversed.

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[42] "If the several States in the Union are to become one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Samuel Adams, Letter to Richard Henry Lee, 3 Dec. 1787, in *The Writings of Samuel Adams* 4:324 (Harry A. Cushing ed. 1968).